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February 2, 2012

VIA HAND DELIVERY

The Honorable Lisa P. Jackson, Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

RE: Request for Agency Stay Pending Review of Interim Final Rule Establishing Nonconformance Penalties for On-Highway Heavy Heavy-Duty Diesel Engines

Dear Administrator Jackson:

We are writing on behalf of Daimler Trucks North America LLC ("DTNA") and Detroit Diesel Corporation ("DDC"), pursuant to Federal Rule of Appellate Procedure 18(a), to request that the U.S. Environmental Protection Agency ("EPA") stay its Interim Final Rule, signed January 20, 2012 and published January 31, 2012, pending judicial review.[1] DTNA and DDC intend to file a petition for review of the Interim Final Rule in the United States Court of Appeals for the District of Columbia Circuit pursuant to the Clean Air Act, 42 U.S.C. §§ 7401-7671q ("CAA"). Federal Rule of Appellate Procedure 18(a) provides that, before moving for a stay of agency action in the Court of Appeals, a petitioner must ordinarily move first before the agency for a stay pending review of its action. Accordingly, DTNA and DDC request that EPA stay its Interim Final Rule. If DTNA and DDC have not received a response within 10 days of the date of this letter, we will assume that EPA has denied our request for stay pending review pursuant to Federal Rule of Appellate Procedure 18(a).

I. Background

On January 20, 2012, EPA announced its decision to establish nonconformance penalties ("NCPs") for oxides of nitrogen ("NOx") emissions from on-highway heavy heavy-duty diesel engines. EPA issued an Interim Final Rule, effective as of January 31, 2012, establishing NCPs for model years 2012 and 2013. At the same time, EPA issued a Notice of Proposed Rulemaking proposing essentially identical NCPs for heavy heavy-duty engines, but also including proposed NCPs for medium heavy-duty engines, which would supersede the interim NCPs upon issuance of the final rule, which is expected no sooner than late in 2012. Although EPA is accepting comments on the NCP rulemakings until April 4, 2012, any comments received will be considered "in the

[1] The Interim Final Rule entitled "Nonconformance Penalties for On-Highway Heavy Heavy-Duty Diesel Engines" was signed and announced on January 20, 2012 and published in the Federal Register at 77 Fed. Reg. 4,678 on January 31, 2012. At the same time, EPA announced a Notice of Proposed Rulemaking, which was published in the Federal Register at 77 Fed. Reg. 4,736 (Jan. 31, 2012).

context of the accompanying notice of proposed rulemaking" and will not affect the Interim Final Rule, which was issued without notice or opportunity for comment before it became effective. *See* 77 Fed. Reg. 4,678, 4,680 (Jan. 31, 2012).

NCPs are intended to provide a limited exception to meeting regulatory emissions standards where EPA finds that the regulatory lead time it has provided is insufficient to enable manufacturers to develop the technology necessary to meet the standards. By paying NCPs, such manufacturers are allowed, on a limited basis, to produce and sell engines that do not comply with the standard. Congress recognized that an escape valve is desirable under certain limited circumstances where the required technology does not yet exist, so that technological laggards are not immediately forced out of the marketplace when EPA issues more stringent standards.

The Clean Air Act permits EPA to establish NCPs within certain specified statutory limits. First, EPA must promulgate regulations governing NCPs "after notice and opportunity for public hearing." CAA § 206(g)(1), 42 U.S.C. § 7525(g)(1). EPA must set an emissions "upper limit," or percentage determined to be "practicable," above which no engine may be certified, even through the manufacturer's payment of NCPs. CAA § 206(g)(2), 42 U.S.C. § 7525(g)(2). EPA must also establish a formula by regulation for determining the amounts of NCPs. CAA § 206(g)(3), 42 U.S.C. § 7525(g)(3). Under this formula, the penalties must: (1) "take into account the extent to which actual emissions of any air pollutant exceed allowable emissions under the standards"; (2) "be increased periodically in order to create incentives for the development of production vehicles or engines which achieve the required degree of emission reduction"; and (3) "remove any competitive disadvantage to manufacturers whose engines or vehicles achieve the required degree of emissions reduction." *Id.*

By regulation, EPA has specified certain additional criteria that must be met for EPA to establish the availability of NCPs and set an NCP amount for a given emission standard. *See* 40 C.F.R. § 86.1103-87. First, there must be a new or revised emission standard that is more stringent than the previous standard for the pollutant, or the existing standard for the pollutant must become more difficult to achieve because of a new or revised standard. 40 C.F.R. § 86.1103-87(a). Second, EPA must find that substantial work will be required to meet the emission standard. 40 C.F.R. § 86.1103-87(a)(1). Substantial work is defined as "the application of technology not previously used in an engine or vehicle class or subclass, or the significant modification of existing technology or design parameters, needed to bring the vehicle or engine into compliance." 40 C.F.R. § 86.1103-87(b). Third, EPA must find that there is likely to be a technological laggard, 40 C.F.R. § 86.1103-87(a)(2), which EPA has explained is "a manufacturer who cannot meet the emission standard due to technological (not economic) difficulties and who, in the absence of NCPs, might be forced from the marketplace, including the elimination of one or more engine families/configurations from production." 67 Fed. Reg. 51,464, 51,465 (Aug. 8, 2002).

EPA has established NCPs applicable to heavy-duty diesel engines only five times over the past 27 years, since it issued its generic "Phase I" regulations setting out the framework and formula for NCPs in 1985. In 1985, EPA set NCPs for particulate matter and NOx emissions for model year 1988. In 1990, EPA set NCPs for NOx for model year 1991. In 1993, EPA set NCPs for particulate matter for model year 1994. In 1996, EPA set NCPs for NOx for model year 1998. Most recently, in 2002, EPA set NCPs for non-methane hydrocarbon plus NOx emissions for model year 2004. Now, in 2012, EPA is establishing NCPs for the heavy-duty diesel NOx emission standard, which was promulgated in 2001, was phased in beginning in 2007, and became fully effective in 2010.

When EPA sets NCP amounts, it must gather cost data from manufacturers in order to determine the costs of compliance with the emission standard and ensure that it removes "any competitive disadvantage" to complying manufacturers. *See* CAA § 206(g)(3)(E), 42 U.S.C.

§ 7525(g)(3)(E). From these data, EPA is able to derive various factors and inputs necessary to calculate the appropriate penalty amount, so that any competitive disadvantage to complying manufacturers is removed. In the past, EPA has requested information in writing from engine manufacturers, proposed the values for a new NCP for a given emission standard with proper public notice, accepted comments from the manufacturers and other members of the public, revised its proposal accordingly, and then issued its final rule. In this case, EPA contacted various engine manufacturers via telephone in late 2011 requesting preliminary information for a proposed NCP rulemaking but did not take written submissions and refused requests for additional meetings with individual manufacturers. Without prior notice, EPA then issued its Interim Final Rule establishing NCP values much lower than the preliminary cost estimates it had received from DTNA and DDC—effective immediately.

In its Interim Final Rule, EPA admits that, although any manufacturer may use these NCPs, they were established to benefit one manufacturer. After using credits to certify its engines rather than meeting the 2010 NOx standard for more than two years, this manufacturer "notified [EPA] late in 2011 that it would not have enough emissions credits for its model year 2012 heavy heavy-duty engines." 77 Fed. Reg. at 4,679. This same manufacturer—not named by EPA but known to be Navistar, Inc.—filed multiple lawsuits against EPA in 2009, in part challenging the 2010 NOx standard as infeasible. The NOx standard was set through rulemaking in 2001, was phased in beginning in 2007, and became fully effective in 2010. In 2001, several different technologies were considered by EPA and heavy-duty diesel engine manufacturers to have the potential to meet the stricter 0.2 gram per brake horsepower-hour NOx standard. Over the course of the next six to eight years, as manufacturers utilized the lead time provided by EPA, it became clear that only selective catalytic reduction ("SCR") technology was capable of meeting the 0.2 g/bhp-hr NOx standard. While the rest of the industry adopted SCR technology, Navistar committed itself to using only exhaust gas recirculation ("EGR") to meet the 0.2 g/bhp-hr NOx standard. Since then, Navistar has waged a media campaign against its competitors' SCR technology, and filed another set of lawsuits in 2011 against the California Air Resources Board and EPA, seeking to subject its competitors' SCR-equipped engines to unwarranted testing requirements in an effort to force the recall of their engines. All the while, Navistar has failed to produce an engine capable of meeting the 0.2 g/bhp-hr NOx standard.

In response to Navistar's belated notice that it would not have enough emissions credits for the 2012 model year, EPA acted hastily and announced its Interim Final Rule on January 20, 2012, providing no notice or opportunity for comment. In its Notice of Proposed Rulemaking, announced at the same time, EPA acknowledges the many ways in which the current NCP process and calculation differs from EPA's prior rules, and requests comments on many of the flaws in its current approach. Given its many flaws, DTNA and DDC respectfully request that the agency stay its Interim Final Rule.

II. Factors Supporting Request for Stay

Under the Administrative Procedure Act, EPA has authority to postpone the effective date of a rule pending judicial review when it finds that "justice so requires." 5 U.S.C. § 705. Even under the rubric that Article III courts use to evaluate a stay, the Interim Final Rule should be put on hold pending review. That rubric dictates that a court stay an agency rule when: (1) the movant is likely to prevail on the merits; (2) the movant will suffer irreparable harm absent a stay; (3) the adverse party will suffer no substantial harm from the issuance of a stay; and (4) the public interest will be served by granting a stay. *Wis. Gas Co. v. FERC*, 758 F.2d 669, 673-74 (D.C. Cir. 1985). All four factors weigh in favor of a stay of EPA's Interim Final Rule pending review by the D.C. Circuit Court

of Appeals.[2] Accordingly, DTNA and DDC request that EPA stay the Interim Final Rule and postpone the availability of nonconformance penalties until the proposed rulemaking is finalized through public notice-and-comment and proper consideration of comments received, or until the Interim Final Rule is upheld by the D.C. Circuit.

A. DTNA and DDC Are Likely to Prevail on the Merits

DTNA and DDC intend to petition for review of the Interim Final Rule on the basis that EPA has taken actions that are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. DTNA and DDC are likely to prevail for at least three reasons: (1) EPA has not met the legal criteria required by its own regulations for establishing NCPs; (2) EPA has not complied with the statutory requirements for establishing NCPs under the Clean Air Act; and (3) EPA has unlawfully issued an Interim Final Rule without prior notice and opportunity for comment.

1. EPA Has Not Met the Legal Criteria Required by Its Own Regulations

NCPs are not to be granted lightly. And the Agency's regulations reflect that, imposing stringent triggers that will rarely be met. As we demonstrate below, EPA's decision to establish the NCPs here does not meet the three regulatory criteria. The Agency's missteps share a common denominator: there is nothing new and certainly nothing exigent that warrants this radical relief. The NOx standard at issue here was issued more than a decade ago. During that time, every manufacturer—save for Navistar—invested tens of millions of dollars to comply with EPA's mandate by using a well-proven technology. That Navistar chose a different route—one that has led to a dead end so far—is no reason to change the rules now. NCPs should not be granted simply to appease the idiosyncratic—and stubbornly wrong—choices of a single manufacturer in the industry.

a. There Is No New or Revised Emission Standard for 2012

Under EPA's own regulations, an NCP may be set only "when any new or revised emission standard is more stringent than the previous standard for the pollutant, or when an existing standard for that pollutant becomes more difficult to achieve because of a new or revised standard." 40 C.F.R. § 86.1103-87(a). Here, there is no new or revised NOx standard; the standard is the same for 2012 as it was for 2010, and it was promulgated in 2001 with adequate notice to manufacturers.[3] Further, there are no other new or revised standards that make the 2012 NOx standard more difficult to achieve. In attempting to justify its Interim Final Rule establishing NCPs, EPA conveniently ignores the fact that it is now 2012 and instead focuses on the fact that the 2010 NOx standard was lower than the 2004 standard. *See* 77 Fed. Reg. at 4,681. EPA also states: "*When promulgated* [i.e., in 2001], the Agency concluded that the 0.20 g/bhp-hr NOx standard was a technology forcing standard." *Id.* (emphasis added). EPA's conclusion 11 years ago has no bearing on whether there now exists a new or revised and more stringent emission standard applicable to the current model year for which EPA seeks to set NCPs.

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[2] In setting forth this summary of the four factors weighing in favor of a stay, DTNA and DDC do not intend to restrict their ability to assert additional arguments and reserve all rights to fully brief these and any other legal arguments in the D.C. Circuit Court of Appeals.

[3] All of EPA's previous NCP rulemakings were conducted before or at the same time that the emission standards were taking effect. Most were established one to two years before the standard became effective—e.g., NCPs for the 2004 standards were promulgated in 2002, two years before the standards become effective. It is now 2012, eleven years after the NOx standards were promulgated in 2001 and two years after the NOx standard become effective. The regulatory provisions cannot reasonably be read to allow for such a belated NCP determination.

b. Substantial Work as Defined by EPA Is Not Required

Before establishing an NCP for a particular emission standard for a particular subclass of heavy-duty engines, EPA must also find that "substantial work" will be required to meet the emission standard. Substantial work is defined as "the application of technology not previously used in an engine or vehicle class or subclass, or the significant modification of existing technology or design parameters, needed to bring the vehicle or engine into compliance." 40 C.F.R. § 86.1103-87(b). EPA cannot find that substantial work is required to meet the 2010 NOx standard now that SCR has been used—successfully—in heavy-duty diesel engines, including engines manufactured by Navistar for other markets.[4]

This is not a close question. The rest of the industry was able to implement SCR in time to meet the 2010 standard. Navistar faces a much easier time now that its competitors have done all of the hard work for it, having developed both the technology and the necessary infrastructure for an effective solution. EPA has recognized that this situation, where all engine manufacturers except one have already met the standard, cannot justify a "substantial work" finding: "Obviously, *substantial effort would not be required if many manufacturers' vehicles/engines were already meeting the revised standard or could do so with relatively minor calibration changes or modifications*." 50 Fed. Reg. 35,374, 35,403 (Aug. 30, 1985) (emphasis added). While substantial work was required before model year 2010, it can no longer be said to be needed in 2012, two years after SCR was implemented in the same class of engine by every other manufacturer in the industry. For EPA to insist otherwise gets the regulatory analysis backwards. That freewheeling approach would justify NCPs any time new technology is used to meet an emission standard—a result Congress surely did not intend under the Clean Air Act.

c. There Is No Technological Laggard

In addition to finding that substantial work will be required, EPA must also find that there is likely to be a technological laggard before establishing an NCP for a particular emission standard. The emphasis is very much on the adjective "technological"; not just any laggard will do. As the Agency has noted, a technological laggard is "a manufacturer who cannot meet the emission standard due to technological *(not economic)* difficulties and who, in the absence of NCPs, might be forced from the marketplace." 67 Fed. Reg. 51,464, 51,465 (Aug. 8, 2002) (emphasis added).

The distinction between true technological laggards and economic laggards—particularly those who have intentionally impoverished themselves—is critical here. As one federal court has held, "NCPs were intended to give a manufacturer *that has made every effort to comply*, but has been unable to achieve compliance, a chance to continue to participate in the market." *United States v. Caterpillar, Inc.*, 227 F. Supp. 2d 73, 88 (D.D.C. 2002) (emphasis added). That is exactly what this Agency has said before as well: "An emission standard may become more difficult to meet and substantial work may be required for compliance, but if that work *merely involves transfer of well-developed technology from another vehicle class, it is unlikely that a technological laggard would develop*." 67 Fed. Reg. at 51,465 (emphasis added).

That is precisely this case. It is undisputed that SCR is a proven technology adopted by the rest of the industry. It is likewise undisputed that Navistar has failed to demonstrate that it cannot

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[4] *See* MWM International Press Release, http://www.navinternational.com.br/default.asp?su=7&pa=detalhes&fo=releases&id=82 (Nov. 22, 2006) (indicating that Navistar's wholly owned subsidiary MWM International "has opted to use SCR system for heavy applications, such as trucks" in Brazil); *see also* Navistar MaxxForce 9.3H Engine Brochure (using SCR aftertreatment to meet Euro V emission standards).

use SCR. To the contrary, Navistar's wholly owned subsidiary is already using SCR in Brazil. What that means is that Navistar purposefully chose not to use SCR in the United States, thinking it could gain some economic or competitive advantage.[5] But EPA need not delve into Navistar's subjective reasons for refusing to do what every other manufacturer in the industry diligently did to comply. Instead, it is enough to recognize that the work involved in meeting the 2010 NOx standard now merely involves the transfer of well-developed technology. From that indisputable premise, only one conclusion follows: EPA cannot find that a technological laggard exists.

To the extent EPA considered this factor, it offered an ill-fitting justification. According to EPA, Navistar is a "technological laggard" because it "intends to use a different technology to meet the NOx standard . . . . Since it has not yet submitted an application for certification for any model year 2012 heavy heavy-duty diesel engines that would not require emission credits, we believe it is a reasonable possibility that [Navistar] may not be able to comply for technological reasons with respect to the 2010 NOx standards for heavy heavy-duty diesel engines in the 2012 and 2013 model years." 77 Fed. Reg. at 4,681. Navistar has used credits to sell its engines since the 0.2 g/bhp-hr NOx standard became fully effective in 2010 and continues to maintain a NOx credit balance into 2012. All along, Navistar has publicly promised its investors, dealers, and customers that it has a 0.2 g/bhp-hr compliant engine ready for certification and production. In fact, Navistar submitted certification data for a 0.2 g/bhp-hr engine to EPA on January 31, 2012—the same day that the Interim Final Rule was published in the Federal Register and the NCPs took effect.[6] Accordingly, a critical factual predicate of the Agency's rulemakings has been proven incorrect on the same day that it published its no-comment rulemaking in the Federal Register. That alone is good cause to stay the Interim Final Rule. But Navistar's recent disclosures provide even more support for staying the rulemaking.

Specifically, Navistar has an engine that can meet the 2010 NOx standard, but according to its Senior Vice President of North American Sales Operations: "'[W]e can't get optimum performance' in fuel economy, and executives *don't want* to release the engine for sale, Hebe said. Tests show the point-2 engine, a 12.4-liter Maxx Force 13, gets fuel economy as good as the current model, but execs want it to be better. Drivers and owners 'won't see the difference' in the point-2 engine's performance if they used it as it now is, because *there are no equipment changes*, he said. The *lower NOx emissions can be achieved with modified fuel pressures, altered introduction of inlet*

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[5] *See, e.g.*, DiscoverDEF.com, http://www.discoverdef.com/news/2011/3/16/navistar-considersnew-emissions-reduction-technologies.aspx (Mar. 16, 2011) (quoting Jim Hebe, Navistar Senior Vice President of North American Sales Operations, as saying that Navistar would not consider implementing aftertreatment using diesel exhaust fluid to reduce NOx emissions from its heavy-duty diesel engines); *see also* Today'sTrucking.com, Navistar OK with SCR engines – in S. America, http://www.todaystrucking.com/news.cfm?intDocID=22361 (Aug. 25, 2009) ("It may not believe in SCR technology as an emissions solution for North America, but Navistar is apparently going with the aftertreatment strategy on its engines in Brazil.").

[6] *See* Navistar Press Release, Navistar Hosts Analyst Day; Company formally submits EPA certification data for 0.2g NOx in-cylinder engine, http://www.navistar.com/Navistar/News/Newsroom# (Feb. 1, 2012) ("The company also announced it formally submitted its 0.2g NOx in-cylinder engine certification data to the United States Environmental Protection Agency."); *see also* TruckingInfo.com, Customers Wouldn't Pay Extra for Any Non-Compliance Penalties Imposed on Navistar, Hebe Says, http://www.truckinginfo.com/news/news-detail.asp?news_id=75958&news_category_id=36 (Feb. 1, 2012) ("Navistar is ready with an engine that does meet the 0.2-gram NOx limit, and it submitted its specifications to the EPA on Tuesday [January 31, 2012].").

air, and recalibration of electronic controls."[7] Navistar's own public statements demonstrate that it has intentionally chosen not to meet the 2010 NOx standard due to concerns about fuel economy—a factor completely irrelevant to a determination by EPA of whether NCPs are warranted. Navistar admits that it is not a technological laggard and that it does not now require "substantial work" for it finally to comply with the 2010 NOx standard. Thus, Navistar has a choice of two technology paths for compliance: the EGR technology solution it has promoted as capable of meeting the standard for years; or the SCR technology proven by the rest of the industry in use for more than two years. The indisputable existence of either engine technology makes it impossible for EPA to conclude that there is a technological laggard, or that "substantial work" is still required. There is simply no basis to conclude that Navistar is anything other than an intentional economic laggard who made a business decision to cling to EGR technology and use credits to sell otherwise noncompliant engines until its credits ran out and it was forced to produce a compliant 0.2 g/bhp-hr engine.

2. EPA Has Not Complied with the Statutory Requirements for Establishing NCPs Under the Clean Air Act

The Clean Air Act mandates that any NCP set by EPA must "remove any competitive disadvantage to manufacturers whose engines or vehicles achieve the required degree of emissions reduction." CAA § 206(g)(3)(E), 42 U.S.C. § 7525(g)(3)(E). EPA has failed to meet this statutory obligation. The NCP amount set by EPA in the Interim Final Rule comes nowhere near approximating the true cost of producing an engine that is compliant with the 2010 NOx standard. EPA is requiring Navistar to pay a maximum of $1,919 per engine to continue selling engines that pollute at more than double the standard. DTNA and DDC informed EPA that it costs DDC many times that much per engine for the additional hardware necessary to meet the 2010 NOx standard. This information does not even include lost market share or the additional warranty costs that have been recognized by EPA previously as important cost factors. EPA's current figure is also a fraction of the $12,210 penalty it established for the same degree of NOx exceedance for the 2004 NOx standard, which was EPA's most recent prior rule on NCPs for heavy-duty diesel engines.[8] Unlike the 2010 NOx standard, which to date has required a new type of emissions control technology, the entire industry met the 2004 NOx standard using in-cylinder emissions control strategies that had already been developed. EPA has provided no explanation of why the current standards, which to date have only been met by using new SCR technology, are not more costly than the NCPs for the 2004 NOx standard. Of course, EPA would not take written submissions and refused requests for additional meetings, saying that it was simply gathering preliminary information for a proposed NCP rulemaking. Even so, EPA came out with a figure that is a small fraction of the figures presented by complying manufacturers in the preliminary discussions.

EPA's figure does not adequately reflect the actual costs of incorporating compliant technology, in large part because it assumes a baseline engine that already has SCR technology in place. But Navistar does not already have SCR technology in place on its U.S. engines, and neither did the complying manufacturers when the standard was promulgated in 2001. The complying manufacturers invested in the research and development, hardware components, software, infrastructure, and other advancements necessary to design and produce engines that are actually compliant with the 2010 NOx standard—investment that Navistar has thus far failed to make. It is unreasonable, and unfair, to give Navistar the benefit of assuming a baseline engine that incorporates the very technology that Navistar has chosen not to adopt.

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[7] TruckingInfo.com, Customers Wouldn't Pay Extra for Any Non-Compliance Penalties Imposed on Navistar, Hebe Says, http://www.truckinginfo.com/news/news-detail.asp?news_id=75958&news_category_ id=36 (Feb. 1, 2012) (emphasis added).

[8] *See* EPA, Regulatory Announcement: Nonconformance Penalties for Heavy-Duty Diesel Engines (August 2002).

In fact, the NCP level is so low that Navistar's competitors will be forced to consider manufacturing engines that do not meet the NOx standard in order to take advantage of the competitive advantage afforded by the below-market NOx NCP. The legislative history makes clear that this was not the intent behind the NCP provision: "The Committee does not intend to encourage non-compliance with the revised standards. For example, if a manufacturer opts to pay the penalty and to design or tune the vehicle or engine to higher emission levels, the nonconformance penalty would probably be inadequate and should be revised." H.R. Rep. 95-294, at 276 (1977). The NCP regulations do not give EPA the option of providing NCPs for one manufacturer and not the others. The only solution is to ensure that the NCP penalty is high enough to encourage full compliance with the NOx standard.

By assuming a baseline engine with SCR technology and factoring in only the incremental costs associated with adjusting that SCR technology from a 0.50 to a 0.20 g/bhp-hr NOx emission level, EPA has completely vitiated the NCP calculation and the intent of the Clean Air Act. Given proper notice and opportunity for comment, the complying manufacturers could have provided EPA with the necessary information to enable it to set an NCP that removed any competitive disadvantage, as required under the Clean Air Act. As it stands now, EPA's Interim Final Rule must be vacated due to EPA's failure to fulfill its statutory mandate to remove any competitive disadvantage to complying manufacturers.

3. EPA Unlawfully Issued the Interim Final Rule Without Prior Notice and Opportunity for Comment

Finally, DTNA and DDC are likely to succeed on the merits because EPA improvidently issued the NCP Interim Final Rule without any notice-and-comment period. *See* CAA § 206(g)(1), 42 U.S.C. § 7525(g)(1) (NCP regulations may only be "promulgated by the Administrator after notice and opportunity for public hearing"). EPA purported to excuse that procedural shortcut by invoking section 553(b)(B) of the Administrative Procedure Act. But that narrow provision does not offer the Agency unfettered discretion to exempt itself from orderly rulemaking at its whim. Just the opposite. Congress provided that safety valve for truly extraordinary cases where notice and comment would be "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). Because EPA has failed to offer a rational explanation for its unprincipled departure from orderly rulemaking, the Agency should grant a stay until the D.C. Circuit can review its decision.

And there is little doubt how the D.C. Circuit will resolve the claim. Time and again, that court has held that "the various exceptions to the notice-and-comment provisions of section 553 will be *narrowly construed* and only *reluctantly countenanced*." *New Jersey v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980) (emphasis added); *accord Lake Carriers' Ass'n v. EPA*, 652 F.3d 1, 6 (D.C. Cir. 2011); *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001). And for good reason: the Administrative Procedure Act's notice-and-comment requirement "was one of Congress's most effective and enduring solutions to the central dilemma it encountered in writing the APA[:] reconciling the agencies' need to perform effectively with the necessity that 'the law must provide that the governors shall be governed and the regulators shall be regulated, if our present form of government is to endure.'" *Am. Bus Ass'n v. United States*, 627 F.2d 525, 528 (D.C. Cir. 1980) (quoting S. Doc. No. 248, 79th Cong., 2d Sess. 244 (1946)). The exception "is not an 'escape clause'; its use 'should be limited to emergency situations.'" *Util. Solid Waste Activities Grp.*, 236 F.3d at 754 (quoting *Am. Fed'n of Gov't Emps. v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981)).

EPA ignored these admonitions. Far from identifying any "emergency situations" that warranted expedited rulemaking, the Agency pointed to a handful of workaday concerns. More troubling still, the four rationales ginned up by EPA to justify its end-run around the notice-and-

comment requirement are conclusory and impermissibly vague: (1) taking interim action avoids the possibility of "an engine manufacturer"—Navistar—from being unable to certify a complete line of products for model year 2012 and/or 2013; (2) the rule is only amending "limited provisions" in existing NCP regulations; (3) the rule's duration is limited; and (4) there is no risk to the public interest in allowing manufacturers to certify using NCPs before the point at which EPA could make them available through notice-and-comment rulemaking. 77 Fed. Reg. at 4,680. None of these justifications is sufficient to salvage the Interim Final Rule.

a. First, EPA cannot waive notice-and-comment rulemaking simply because an individual market participant—Navistar—may be harmed without the waiver. To the extent that Navistar will have problems certifying a full range of model year 2012 and 2013 engines, it is a problem of Navistar's own making. Keep in mind that Navistar was well aware of the 2010 NOx emission standard in 2001, when it was first adopted. Navistar was also aware that SCR technology was available for Navistar to meet its 2010 NOx standard obligations, given that Navistar's competitors were spending millions developing it and incorporating it into their fleets. But the real punch line is that even Navistar was using the technology—just overseas, not here in the United States. Yet rather than rely on tried-and-true technology, Navistar made a bet. It bet that it could develop a 2010 NOx standard compliant engine without using SCR, and put its regulatory compliance down as stakes.

That bet did not pay off. And that has been apparent since at least 2009, when Navistar sought review in the D.C. Circuit of the 2010 NOx standard. *Navistar v. EPA*, No. 09-1113 (D.C. Cir. 2009). In that litigation, Navistar argued that the 2010 NOx standard was infeasible, in part because its EGR technology would be unable to meet it. *See* Petitioner's Final Opening Brief, at 30-31, 61, *Navistar v. EPA* (No. 09-1113) (Apr. 5, 2010 D.C. Cir.) ("Navistar 2009 Brief") (admitting that Navistar invested in credits because it knew that it would be unable to comply with the 2010 NOx standard and arguing that the 0.20 NOx standard should be repealed because it cannot be met). EPA acknowledged that "Navistar's EGR engines emit approximately 0.50g NOx, or over twice the 0.20g standard. As such, Navistar will only be certified as meeting the 2010 NOx requirements by using banked credits." Respondent's Final Opposition Brief, at 29-30, *Navistar v. EPA* (No. 09-1113) (Apr. 9, 2010 D.C. Cir.).[9]

EPA's statement in the 2009 litigation is telling. It demonstrates that EPA was not only aware that Navistar would not have a 2010 NOx compliant engine—something the whole industry had known—but also that Navistar would be using credits to put its product line onto the market. It shows, in other words, that EPA knew that Navistar was living on borrowed time. If EPA wished to pursue NCPs as a way to allow Navistar to certify a full product line, it could have begun that process then as it always has—through notice and comment before the emission standard took effect. Instead, EPA allowed Navistar to gamble that it would be able to bring a 2010 NOx compliant engine onto the market before its credits ran out, and bailed Navistar out with NCP penalties when that gamble turned out to be a bust. In short, EPA used the APA's waiver of notice and comment provision as an escape clause to save Navistar from its own bad business choices. That is hardly an emergency. *See Util. Solid Waste Activities Grp.*, 236 F.3d at 754.

[9] Of course, the 2009 litigation only represents the culmination of what must have been an understanding for some time at Navistar that there would be no way for Navistar to comply with the 2010 NOx standard. A manufacturer does not seek the relief that Navistar sought in that case—an order essentially forbidding EPA from certifying *any* SCR engines and revoking the certificates of conformity issued to existing SCR engines—lightly. *See* Navistar 2009 Brief, at 60 (demanding that the certificates of conformity issued for model year 2010 SCR engines be revoked).

Fundamentally, EPA's rush to issue the Interim Final Rule is based on a deeply flawed premise. It assumes that EPA has an obligation to ensure that Navistar is able to sell heavy heavy-duty engines. *See* 77 Fed. Reg. at 4,680 ("[M]aking NCPs available through this Interim Final Rule is the only way to ensure that the manufacturer's depletion of NOx credits will not force it to cease production of heavy heavy-duty engines this year."). But the Agency's mandate is not to coddle or favor one manufacturer to the detriment of an entire industry that has diligently invested millions over a decade to honor EPA's mandate.

But even if EPA had some obligation to insulate Navistar from its own misguided decisions, an impending deadline alone still would not allow the Agency to waive notice and comment rulemaking. *See Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 581 (D.C. Cir. 1981). That makes good sense. Were the rule otherwise, "an agency unwilling to provide notice or an opportunity to comment could simply wait until the eve of a statutory, judicial, or administrative deadline, then raise up the 'good cause' banner and promulgate rules without following APA procedures." *Id*. In fact, the D.C. Circuit has held that even where an interim rule was of "life-saving importance," allowing an exception to notice and comment rulemaking was an "extremely close" question and only allowed "guardedly." *Id.* at 581-82.

Here, of course, the Interim Final Rule is hardly of "lifesaving importance." Rather, it is more like the interim rule vacated in *Union of Concerned Scientists v. Nuclear Regulatory Commission*, 711 F.2d 370 (D.C. Cir. 1983). As the Court explained, "when the Commission incorporated compliance deadlines into all operating licenses, it saddled itself with the burden of providing an opportunity for public comment when it became necessary to change those deadlines." *Id.* at 383. Indeed, because the agency's staff had known of the looming deadline for eleven months, yet did not undertake notice and comment rulemaking, the agency's decision to eliminate the notice and comment opportunity was especially "egregious." *Id.* at 382-83.

So too here. When EPA set the 2010 NOx compliance deadlines, "it saddled itself with . . . providing an opportunity for public comment [if] it became necessary to change those deadlines." *Id.* at 383. EPA knew of Navistar's impending depletion of its credits for much longer than eleven months—it knew for over two years. That makes its failure to promptly propose rulemaking even more egregious than in *Union of Concerned Scientists*. As the D.C. Circuit has explained, when "an alleged 'emergency' arises as the result of the agency's own delay, the claims . . . advanced by EPA [regarding lack of necessity for notice and comment] are baseless." *Envtl. Def. Fund, Inc. v. EPA*, 716 F.2d 915, 920-21 (D.C. Cir. 1983). EPA's claims of emergency in the Interim Final Rule are equally baseless.

b. EPA's second justification—that issuing the NCP Interim Final Rule without notice and comment is permissible because the rule "is only amending limited provisions in existing NCP regulations," 77 Fed. Reg. at 4,680—is both factually disingenuous and legally insufficient. It is disingenuous because the Interim Final Rule does more than just tweak some small portion of the existing regulations; it creates an entirely new category of NCP for regulatory standards and engine model years that have never been covered by NCPs before. It also fundamentally changes the competitive landscape in the heavy heavy-duty diesel engine market for model years 2012 and 2013. Before the Interim Final Rule, Navistar's competitors could rest assured that Navistar would either finally certify a 0.2 g/bhp-hr compliant engine or drop out of the market when it finally ran out of credits for a given service class. But after the Interim Final Rule, the marketplace has been turned upside-down. Navistar, far from certifying a compliant engine or finally acknowledging that its gamble on non-SCR technology did not pay off and leaving the market, has been given a license to sell noncompliant engines at a fraction of the cost of achieving actual compliance.

Indeed, it is hard to see how any NCP penalty rulemaking could be a "limited" change. NCPs are binary—either they exist for a certain emission standard in a certain model year or they do not. And when they do exist, they enable the sale of engines that would otherwise be illegal. That is why notice and comment is so essential when NCPs are permitted. Only if the industry is allowed to participate *before* the rule issues can EPA meet its statutory mandate to "remove any competitive disadvantage to manufacturers whose engines or vehicles achieve the required degree of emission reduction." CAA § 206(g)(3)(E), 42 U.S.C. § 7525(g)(3)(E).

But even if EPA's statement that the Interim Final Rule is a limited adjustment were true, which it is not, it would not be legally sufficient "good cause" under the APA. As the D.C. Circuit has explained, "our cases instruct that 'the limited nature of the rule cannot in itself justify a failure to follow notice and comment procedures.'" *Tenn. Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1145 (D.C. Cir. 1992) (quoting *Council of S. Mountains, Inc.*, 653 F.2d at 582). If the limited scope of a rule were enough to excuse notice and comment, "agencies could issue interim rules of limited effect for any plausible reason, irrespective of the degree of urgency. Should this be allowed, the good cause exception would soon swallow the notice and comment rule." *Id.* Given that there is little—indeed, no—urgency to implement NCPs, the purported limited scope of the Interim Final Rule is no grounds to validate its issuance without proper notice and comment.

Nor can EPA brush aside its notice-and-comment obligations by pointing to previous comments that the Agency has solicited. First, those comments are stale: EPA last solicited comments on NCPs in 2002. By any measure of relevance, the industry and public's views on what NCPs should have looked like in 2002 have no bearing on whether NCPs should be permitted in 2012 and, if so, at what price.[10] To the extent an agency can ever sidestep notice and comment by pointing to comments made in the past, it must rely on comments of far more recent vintage. Musty comments from a decade ago will not do.

More importantly, EPA also ignores the fact that the subject matter of the current rules—NCPs for model year 2010 NOx standards—have never been subjected to public notice and comment. EPA identifies specific provisions that it is not revisiting with the issuance of the Interim Final Rule—"how to calculate penalties from the penalty parameters, how to determine a compliance level, or how to report to EPA." 77 Fed. Reg. at 4,680. What it fails to mention are the changes it is making to the provisions governing the upper limit determination and of course, the fact that for the first time it is making NCPs available and setting the associated cost parameters for the 2010 NOx emission standard.

c. EPA's third justification—that the Interim NCP Rule is "limited in duration"—is also factually wrong and legally insufficient. The statement is factually wrong because two model years is not a limited time in the trucking business or engine-manufacturing industry. Two model years of NOx noncompliant engines will have effects that stretch for much longer than two years. A heavy

[10] As the D.C. Circuit has held, "'[a]lthough the Administrative Procedure Act does not establish a 'useful life' for a notice and comment record, clearly the life of such a record is not infinite.'" *Mobil Oil Corp. v. EPA*, 35 F.3d 579, 584 (D.C. Cir. 1994) (quoting *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 800 (D.C. Cir. 1983)). Thus, in *Action on Smoking and Health*, the D.C. Circuit refused to find that the record was sufficiently fresh when the latest comments solicited were between two and four years old. 713 F.2d at 801. The Court's reason was obvious: "It cannot be presumed that no evidence relevant to the problem . . . could have developed in the interim." *Id.* If comments between two and four years old are insufficiently fresh to justify waiving notice and comment, comments that are close to *ten years old* are positively rotten. Much has changed in the heavy-duty diesel engine market since then, and the industry should have had the opportunity to bring those changes to EPA's attention *before* it issued the Interim Final Rule, not after.

heavy-duty truck engine can be rebuilt an average of four times, giving it an effective useful life of well over one million miles.[11] In short, EPA's decision to allow NCPs for Navistar's engines now will have an effect far beyond the two model years for which these NCPs are authorized. EPA's decision will stretch as long as Navistar's noncompliant engines are on the road.

Moreover, the D.C. Circuit has never allowed notice-and-comment rulemaking to be excused simply because a rule is only temporary. As the Court has recognized, its "tolerance of 'temporary' measures installed without a public airing may give [an] agency an apparent incentive to proceed with its permanent rulemaking at a leisurely pace." *Mid-Tex Elec. Co-Op, Inc. v. FERC*, 822 F.2d 1123, 1132 (D.C. Cir. 1987). The Interim Final Rule's "interim" status is not enough to evade the notice and comment requirement.

d. EPA's final justification for ignoring its notice and comment obligations is its weakest. It argues in the Interim Final Rule that "should EPA be incorrect in its projection that NCPs will be needed during model year 2012, the fact that they will be available on an interim basis will have no practical significance because manufacturers will not use them." 77 Fed. Reg. at 4,680. According to EPA, this shows there is "no risk to the public interest." *Id.*

But this justification misses the point. The harm to the public interest from the Interim Final Rule is not that NCPs will be made available on an interim basis and not be used. It is that Navistar *will* use them and that *will* hurt both the environment and the competitive marketplace. Where, as here, an agency's justification is a "complete non sequitur," it is arbitrary and capricious and its order must be vacated. *See Tenn. Gas Pipeline Co. v. FERC*, 824 F.2d 78, 84 (D.C. Cir. 1987).

B. Absent a Stay, DTNA and DDC Will Suffer Irreparable Harm

A stay is also warranted because DTNA and DDC will be irreparably harmed by the Interim Final Rule. First, if a stay is not granted, DTNA and DDC will suffer financial harm that they will never be able to recoup. This is not a close question. Because the NCP is set so low, Navistar will exploit a massive competitive advantage by producing nonconforming engines at a fraction of the per-engine cost compliant manufacturers have to pay to achieve actual compliance. The disparity is staggering: Navistar is permitted to produce an up to 0.5 g/bhp-hr noncompliant engine at the low rate of $1,919 per engine. By contrast, the hardware and manufacturing costs alone are many times that amount for complying manufacturers to meet the 0.2 g/bhp-hr standard.

EPA has created a no-win situation: Navistar has the dual benefits of not having to comply with the 2010 NOx standard and not having to pay penalties equal to what it actually costs other manufacturers to comply. In fact, the NCP is so grossly inadequate that compliant manufacturers will be forced to consider using the NCPs in order to remove the significant competitive advantage that EPA has impermissibly provided to Navistar.

And unlike a garden-variety civil suit—where those tens of millions of dollars could be recouped later—EPA enjoys sovereign immunity. And that is why the significant losses that DTNA and DDC will suffer are irreparable. As the Eighth Circuit has held, the "threat of unrecoverable economic loss . . . *does* qualify as irreparable harm." *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996) (emphasis added). There is nothing remarkable about that rule. The Tenth Circuit has likewise emphasized that "[i]mposition of monetary damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury." *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 770-71 (10th Cir. 2010); *see also Cal. Pharmacists Ass'n v. Maxwell-*

[11] *See* EPA, Industry Characterization: On-Road Heavy Duty Diesel Engine Rebuilders 1, 3 (Jan. 3, 1997).

Jolley, 563 F.3d 847, 852 (9th Cir. 2009) ("Because the economic injury doctrine rests . . . on ordinary equity principles precluding injunctive relief where a remedy at law is adequate, it does not apply where, as here, the . . . Plaintiffs can obtain no remedy in damages against the state because of the Eleventh Amendment."). In sum, DTNA and DDC will suffer irreparable harm from the Interim Final Rule because they will suffer significant monetary losses for which they will have no recourse against EPA to recover.

Moreover, the Interim Final Rule will cause irreparable damage to the environment. As EPA itself recognizes, NOx is a major component of smog, which can result in a myriad of illnesses, including "bronchitis, aggravated coughing, and chest pain" as well as "increased incidence/severity of respiratory problems."[12] Allowing Navistar to pay artificially low NCPs, while producing and selling engines that pollute at more than twice the legal limit creates excess NOx emissions on the order of 1.01 tons per engine over its effective useful life of one million miles, or 67,024 tons over Navistar's projected 2012 fleet of 66,360 engines. The air quality impacts will not be felt only in 2012 and 2013, but over the entire time period that vehicles with these engines are on the road—which could equate to more than one million miles traveled with the engine rebuilds common to the industry.

C. Neither EPA nor Navistar Will Be Injured by a Stay Pending Review

A stay is further called for because neither EPA nor Navistar will be injured by a stay of the Interim Final Rule pending appeal. EPA will certainly not be injured by a stay pending review in the D.C. Circuit. Indeed, EPA will benefit because, if a stay is granted, noncomplying engines will be kept off the road while review takes place in the D.C. Circuit. That, in turn, will benefit the quality of the air that the Clean Air Act and EPA exist to protect. Moreover, EPA will save valuable administrative resources. If the Interim Final Rule is not stayed, but is later overturned by the D.C. Circuit—as it likely will be—EPA will have wasted its time and effort implementing the Interim Final Rule and certifying Navistar's noncompliant engines, only to have that work undone. EPA has already issued the Notice of Proposed Rulemaking seeking comments on the proposed NCPs that are designed to supersede those made effective by the Interim Final Rule. Postponing the effectiveness of the Interim Final Rule NCPs until that rulemaking process is completed will allow EPA to adhere to its statutory and regulatory mandates, accept and consider public comments received, and issue more appropriate and justifiable NCPs. Staying the Interim Final Rule can only benefit, not harm, EPA.

Moreover, a stay pending review would not harm Navistar. EPA has only speculated that Navistar may run out of credits some time in 2012. Specifically, EPA indicated that Navistar has NOx emission credits remaining, but EPA suspects that Navistar "*could* exhaust its supply of heavy heavy-duty engine NOx credits as early as this year." 77 Fed. Reg. at 4,680 (emphasis added). However, subsequent to the EPA Administrator's signing of the Interim Final Rule, Navistar came out with an official company announcement that it would submit an application for certification of a 0.2 g/bhp-hr compliant engine as early as February.[13] And conveniently, on the same day that the Interim Final Rule was published in the Federal Register and the NCPs took effect, Navistar

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[12] EPA, Human Health and Environmental Effects of Emissions from Power Generation 1, http://www.epa.gov/captrade/documents/power.pdf; *see also* EPA, Nitrogen Oxides – Health, http://www.epa.gov/air/nitrogenoxides/ (describing the adverse health effects from NOx emissions, particularly higher NOx concentrations found near vehicles and roadways).

[13] *See* Navistar Letter to Dealers (Jan. 26, 2012) ("Navistar will submit a 0.2g NOx in-cylinder Big Bore engine for production certification in the coming weeks."); Navistar Press Release, Navistar to Host Annual Analyst and Investor Day February 1, http://www.navistar.com/Navistar/News/Newsroom# (Jan. 20, 2012) ("As previously announced, the company will soon be submitting a .2 NOx (g/hp-hr) engine for certification.").

submitted certification data for a 0.2 g/bhp-hr engine to EPA.[14] This highlights the folly of issuing an NCP when no manufacturer has even made a formal written request for such extraordinary measures. With the certification of a 0.2 g/bhp-hr engine, Navistar will no longer need the NCPs EPA has rushed to issue, and Navistar itself has thus now confirmed that there would be no irreparable harm. At most, Navistar may have a gap of a few weeks in which it may not be able to sell certain of its engines. Although Navistar may be unable to certify a full line of heavy heavy-duty diesel engines for every day of model year 2012 without the Interim Final Rule, that would not be a legally cognizable harm. A stay pending appeal "rests . . . on ordinary equity principles," *Cal. Pharmacists Ass'n*, 563 F.3d at 852, and as the ancient maxim regarding equity goes: "equity aids the vigilant and not those who slumber on their rights." *Pro Football, Inc. v. Harjo*, 565 F.3d 880, 884 (D.C. Cir. 2009). Navistar cannot claim harm from a stay of the Interim Final Rule because it slumbered on its rights when it failed to seek NCPs for the 2010 NOx standard through notice-and-comment back in 2009, when it claimed in lawsuits against EPA that the standard was infeasible. Nor can Navistar claim harm because it failed to seek NCPs for the 2012 and 2013 model years when it first knew or should have known of its impending credit exhaustion, certainly earlier than late 2011. EPA will not be harmed by a stay of the Interim Final Rule, and any harm to Navistar could, and should, have been mitigated by Navistar itself as long ago as 2009. The balance of the equities favors a stay.

D. <u>A Stay Is in the Public Interest</u>

Finally, the public interest favors an injunction. For one, "[t]he public interest is served when administrative agencies comply with their obligations under the APA." *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 21 (D.D.C. 2009); *see also Creosote Council v. Johnson*, 555 F. Supp. 2d 36, 40 (D.D.C. 2008) (stating that there is a "general public interest in open and accountable agency decision-making").

But more importantly, the Clean Air Act allows NCPs as a last resort, not a first. Although the Act grudgingly permits NCPs when there is no other way for a standard to be met, the Act *prefers* the solution that SCR-equipped engine manufacturers like DDC and DTNA reached: complying with the standard. It is undoubtedly in the public interest for Navistar's noncompliant engines to be kept off the road while the D.C. Circuit determines whether to uphold EPA's unprecedented exercise of NCP rulemaking.

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[14] *See* Navistar Press Release, Navistar Hosts Analyst Day; Company formally submits EPA certification data for 0.2g NOx in-cylinder engine, http://www.navistar.com/Navistar/News/Newsroom# (Feb. 1, 2012); *see also* TruckingInfo.com, Customers Wouldn't Pay Extra for Any Non-Compliance Penalties Imposed on Navistar, Hebe Says, http://www.truckinginfo.com/news/news-detail.asp?news_ id=75958&news_ category_id=36 (Feb. 1, 2012) ("Navistar is ready with an engine that does meet the 0.2-gram NOx limit, and it submitted its specifications to the EPA on Tuesday [January 31, 2012].").

For the reasons stated above, DTNA and DDC request that EPA stay the Interim Final Rule pending judicial review.

Sincerely,

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